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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY **CHIEF CLERKS OFFICE**

*Protecting Texas by Reducing and Preventing Pollution*

July 28, 2008

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Mont Belvieu Caverns, LLC  
TCEQ Docket No. 2008-0940-MIS-U (07-11881/Chambers County Appraisal District)  
Executive Director's Response to Mont Belvieu Caverns, LLC's Appeal of the Executive  
Director's Negative Use Determination Issued for Mont Belvieu North Storage

Dear Ms. Castañuela:

Enclosed for filing, please find an original and 11 copies of the "*Executive Director's Response to Mont Belvieu Caverns, LLC's Appeal of the Executive Director's Negative Use Determination Issued for Mont Belvieu North Storage.*"

Please file-stamp these documents and return one copy to D. A. Chris Ekoh, Staff Attorney, Environmental Law Division, MC 173. If you have any questions, please do not hesitate to contact me at (512) 239-5487.

Sincerely,

A handwritten signature in black ink, appearing to be "D. A. Chris Ekoh", with a long horizontal line extending to the right.

D. A. Chris Ekoh, Staff Attorney  
Environmental Law Division

TCEQ DOCKET NO. 2008-0940-MIS-U

TCEQ ID NO. 07-11881

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APPEAL OF THE  
EXECUTIVE DIRECTOR'S NEGATIVE  
USE DETERMINATION ISSUED TO  
MONT BELVIEU CAVERNS, LLC  
APPLICATION NUMBER: 07-11881

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BEFORE THE  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO MONT BELVIEU CAVERNS, LLC'S  
APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION  
ISSUED FOR MONT BELVIEU NORTH STORAGE**

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this response to the appeal of the Executive Director's Use Determination issued to Mont Belvieu Caverns, LLC for its Mont Belvieu North Storage (MBNR) facility. The appeal was submitted by Chris G. Cisneros, property tax representative with Enterprise Products.

For the reasons described below, the Executive Director respectfully requests that the Commission deny the appeal and affirm the Executive Director's Tier I negative use determination for (1) a concrete pump pit, (2) a transfer pump, and (3) piping associated with the installation of a brine storage pond.

**PROGRAM BACKGROUND**

This appeal of the Executive Director's negative use determination is filed pursuant to H.B. 3121 (77<sup>th</sup> Tex. Legislature, 2001) establishing an appeals process for use determinations and the Commission rules implementing the legislation. See TEX. TAX CODE § 11.31 and 30 TEX. ADMIN. CODE § 17.25.

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2. Proposition 2 was implemented when Article VIII, § 1-1 was added to the Texas Constitution on November 2, 1993. The amendment allowed the legislature to "exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

The Texas Legislature codified the constitutional amendment in 1993 as TEX. TAX CODE § 11.31 (effective January 1, 1994). The statutory language in the codified version mirrored the language of Article VIII, § 1-1. In 2001, the legislature amended Section 11.31 when it passed H.B. 3121 (effective September 1, 2001). This bill added several new procedural requirements to § 11.31, including a provision requiring the establishment and implementation of a process to appeal use determinations. See TEX. TAX CODE § 11.31(e) and 30 TEX. ADMIN. CODE § 17.25. The amendment also required the Commission to adopt new rules establishing specific standards for the Executive Director to follow in making use determinations for property that qualified for

either full or partial pollution control use determinations. See TEX. TAX CODE § 11.31(g).

Appeals under Section 17.25 of the Commission rules may be filed by either the applicant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination. TEX. TAX CODE § 11.31(e) and 30 TEX. ADMIN. CODE § 17.25(a)(2). Appellant is required to explain the basis for the appeal. 30 TEX. ADMIN. CODE § 17.25(b)(5) Under Section 11.31(i) of the Tax Code, “the chief appraiser shall accept a final determination by the Executive Director as conclusive evidence that the facility, device, or method is used wholly or partly as pollution control property.”

### **PROCEDURAL BACKGROUND**

On or about February 12, 2008, Mont Belvieu Caverns, LLC (Mont Belvieu or Appellant) filed a Tier I application with the Executive Director seeking a use determination under Section 11.31 of the Tax Code for certain devices associated with the installation of a brine storage pond in Chambers County.

On February 26, 2008, the application was declared to be administratively complete. On March 4, 2008, the Executive Director completed a technical review of the application, and issued a negative Tier I use determination for the installations associated with the brine storage pond listed in the application.

On May 20, 2008, the Executive Director mailed notice of the negative use determination to Mont Belvieu. On June 6, 2008, Mont Belvieu filed a timely appeal with the Office of the Chief Clerk appealing the negative use determination.

### **DESCRIPTION OF THE POLLUTION CONTROL PROPERTY**

The equipment listed in the Tier I application for this project are: (1) construction of one 35' x 70' concrete pump pit, (2) installation of 600 HP transfer pump, and (3) 3,500' of 30" HDPE piping from the new pond to the North Storage. Mont Belvieu described the entire project as follows:

This project consist of one 4.0 million barrel HDPE double lined brine pond, instrumentation, pond piping, electrical substation, and associated equipment. The brine pond will accomplish two significant purposes, waste minimization and prevention of salt water intrusion into inland waters. Also, by recycling brine rather than using fresh water, which would become brine through salt dissolution in daily operation of the cavern system, the total quantity of waste generated will be significantly reduced by constructing this brine pond. **The current scope of this project includes the construction of one 35' x 70' concrete pump pit and the installation of one 600 HP transfer pump. Also included is 3,500 of 30" HDPE piping from the new pond to North Storage.**

(Emphasis added).

### **APPELLANT'S CLAIMS**

Mont Belvieu contends that the "project deserves a positive use determination because it employs many features that prevent the brine (salt water) from contaminating surrounding water. Belvieu contends further that the Executive Director should have granted a positive use determination in this case because the Commission has in the past granted positive use determinations for similar facilities.

### **LEGAL ANALYSIS**

- 1. The Executive Director's negative use determination should be affirmed because brine storage pond or the equipment listed in the Appellant's use determination application are not listed in Part A of the Equipment and Categories List (ECL).**

Belvieu filed a Tier I application and cited item number S-20 in Part A of the ECL as the qualifying basis for the Tier I application. *See* 30 TEX. ADMIN. CODE § 17.14(a). The pollution control properties listed under item S-20 in Part A of the ECL includes "surface impoundments and ancillary equipment (including brine disposal ponds)." The description of the S-20 pollution control properties include "excavation, ponds, clay and synthetic liners, leak detection systems, leachate collection and treatment equipment, monitor wells, pumps, etc." While brine disposal ponds are eligible for a Tier I positive use determination because they are used primarily to dispose oil and gas waste, brine storage ponds are not eligible because they are primarily installed for production purposes to displace and thereby move displaced gas from underground gas storage cavern.

- 2. The Executive Director's negative use determination should be affirmed because the concrete pump pit, transfer pump, and piping involved in this case are not installed to "meet or exceed rules and regulations adopted by any environmental protection agency . . . of this state for the prevention, monitoring, control or reduction of air, water, or land pollution."**

To be eligible for a positive use determination, the property must be installed to "meet or exceed rules and regulations adopted by any environmental protection agency . . . of this state for the prevention, monitoring, control or reduction of air, water or land pollution." Belvieu initially cited 30 TEX. ADMIN. CODE § 305 as the rule it was meeting or exceeding as a result of the installation of the concrete pump pit, transfer pump, and piping. Belvieu did not specify the section or sections of Chapter 305 that the installation of the devices were intended to meet or exceed. Chapter 305 of the Commission rules establishes "the standards and requirements for applications, permits, and actions by the commission to carry out the responsibilities for management of waste disposal activities under" certain sections of the Texas Water Code and the Texas Health and Safety Code. *See* 30 TEX. ADMIN. CODE § 305.1(a). Chapter 305 deals with consolidated permit processing and actions by the commission to carry out its responsibilities for

waste disposal activities. The installations involved in this case are not used for waste disposal, therefore, Chapter 305 is not applicable to the installations.

Pursuant to a notice of deficiency issued by the Executive Director, Belvieu cited 16 TEX. ADMIN. CODE § 3.8 as the rule it was meeting or exceeding. Section 3.8 of the Railroad Commission rules deals with water protection. The equipment listed in the application, concrete pump pit, transfer pump, and piping are not used for the control of water or land pollution. To the extent that Appellant claims the brine pond is eligible for pollution tax exemption, Section 3.8(a)(2) of the Railroad Commission rules defines "brine pit" as a "pit used for the storage of brine which is used to displace hydrocarbons from underground hydrocarbon storage facility." The pond project at issue in this case meets the definition of a "brine pit" under the Railroad Commission rules. The brine storage project and the associated pump and piping are production devices used in oil and gas production operations.

Section 3.8(a)(2) of the Railroad Commission rules is not a rule promulgated primarily "for the prevention, monitoring, control or reduction of air, water or land pollution." However, Section 3.8(d) of the Railroad Commission rules prohibits the disposal of oil and gas wastes "by any method without obtaining a permit to dispose of such wastes. The disposal methods prohibited by this paragraph include, but are not limited to, the unpermitted discharge of oil field brines, geothermal resource waters, or other mineralized waters, or drilling fluids into any watercourse or drainageway, including any drainage ditch, dry creek, flowing creek, river, or any other body of surface water." A brine storage pit as contemplated under Section 3.8(a)(2) of the Railroad Commission rules does not involve the disposal of waste, therefore, it is not eligible for pollution tax exemption under Section 11.31 of the Texas Tax Code and the TCEQ rules implementing it.

Finally, Section 3.8(b) of the Railroad Commission rules prohibits anyone involved in the exploration or production of oil and gas from polluting the surface or subsurface water in the state. The mere storage of brine in a brine pit does not qualify as pollution control. However, the devices installed to prevent contamination of surface or subsurface water in the state, such as synthetic liner, leak detection systems, and monitoring equipment may qualify for pollution tax exemption.

- 3. The Executive Director's negative use determination should be affirmed because the brine storage pit and the associated equipment listed in the instant application (concrete pump pit, transfer pump, and piping) are not used primarily for the control of air, water, or land pollution. They are production properties used to displace and move gas from underground gas storage caverns.**

The pre-requisite for obtaining a tax exemption for pollution control property is that the equipment must be installed to control air, water, or land pollution. Article 8 § 1-l(a) of the Texas Constitution states that "the legislature may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States,

this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.”

Section 11.31(a) of the Texas Tax Code mirrors this constitutional pledge by stating that a “person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution.” Section 11.31(b) defines facility, device, or method for the control of air, water, or land pollution as “. . . any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.”

Section 17.4(a) of the Commission rules states that for an applicant to “obtain a positive use determination, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas, for the prevention, monitoring, control, or reduction of air, water, or land pollution.”

Section 11.31(d) authorizes the Executive Director to determine whether a piece of equipment is used wholly or partly to control air, water, or land pollution. Under Section 17.17(a), a “partial determination must be requested for all property that is either not on Part A of the Equipment and Categories List . . . or does not fully satisfy the requirements for a 100% positive use determination . . . .” A “property that serves both a production and a pollution-reducing purpose, is not entitled to a tax exemption on the total value of the property.” *See* Texas Attorney General Opinion No. JC-0372.

The owner of a production property that does not control air, water, or land pollution is not entitled to receive pollution tax exemption. Brine storage pond is a production storage property not listed in Part A of the ECL. A brine storage pond must be distinguished from a brine disposal pond which is listed in Part A of the ECL under item S-20. While the latter is permitted and used as a pollution control device to dispose brine, the former is used to facilitate gas production by displacing gas in an underground gas storage facility or cavern. The Railroad Commission rules define a brine pit as a pit “used for storage of brine which is used to displace hydrocarbons from an underground hydrocarbon storage facility” while a “salt disposal well” is defined as a “pit used for disposal of produced saltwater.” *See* 16 TEX. ADMIN. CODE § 3.8(a)(2) and (13). Since brine storage pond and associated pump and piping are not listed in Part A of the ECL, the instant application should have been submitted as a Tier II or Tier III application in order to adequately account for the production purposes for which the properties were installed. *See* 30 TEX. ADMIN. CODE § 17.2(14) for the definition of a Tier II application, and 30 TEX. ADMIN. CODE § 17.2(15) for the definition of a Tier III application. The concrete pump pit, transfer pump, and piping associated with a brine storage pond are production properties which are not eligible for pollution tax exemption under Section 11.31 of the Texas Tax Code. At a

minimum, the application should have been submitted as a Tier II or Tier III application. Accordingly, the instant appeal should be dismissed.

- 4. The Executive Director's Tier I negative use determination should be affirmed because the properties, devices, and installations involved in this appeal do not provide environmental benefit at the site as required by 30 TEX. ADMIN. CODE § 17.15.**

A piece of pollution control equipment must provide environmental benefit at the site to be eligible for a pollution tax exemption under the Prop 2 program. *See* 30 TEX. ADMIN. CODE § 17.15. The properties, devices, and installations involved in this appeal do not provide environmental benefits at their sites. The oil and gas operation requiring the installation of a brine storage pond generates pollution at the site. Produced saltwater or brine is an oil and gas waste regulated as a pollutant under the Railroad Commission rules. *See* 16 TEX. ADMIN. CODE § 3.8(a)(26) and 3.8(d). The mere generation and storage of a pollutant does not provide environmental benefit at the site. However, instrumentalities installed to control or prevent the pollutant from contaminating surface or subsurface water may be eligible for pollution tax exemption. In this case, the installation of a synthetic liner, leak detection, and monitoring devices in the brine storage pond may be eligible for pollution tax exemption if they are installed to prevent the intrusion of brine into water in the state.

- 5. The contention that the application involved in this appeal should have been granted because the Executive Director has granted positive use determinations for similar facilities in the past is not dispositive of this appeal.**

Admittedly, the Executive Director has granted positive use determinations for brine storage pits and pieces of equipment installed in the pit to control air, water, or land pollution. The Executive Director is aware of five use determination applications involving brine storage pits. One of the applications (UD-98-4093) received a negative use determination on grounds that a brine storage pit is a product storage device. The other four applications listed devices such as synthetic liners, leak detection systems, vapor detection systems, and a flare unit, installed specifically for pollution control. The Executive Director is not aware of a situation where a positive use determination was granted for the installation of a concrete pump pit, transfer pump, and piping associated with a brine storage pond. These items do not control pollution and were not installed to control pollution. They are production devices used for the operation of an underground gas storage facility or cavern. As such they are not eligible for tax exemption under Section 11.31 of the Texas Tax Code.

### **CONCLUSION**

After careful consideration of the Appeal filed by Mont Belvieu on Use Determination application number 07-11881, the Executive Director concludes that the original Tier I negative use determination issued to Mont Belvieu Caverns, LLC was not issued in error. The Appellant

failed to provide any legal basis upon which the Commission should reverse the Executive Director's use determination in this case. The Executive Director's use determination in this case is consistent with the terms and mandates set forth in the relevant laws and rules. The averred assertions of the Appellant do not alter the findings and the final negative use determination issued by the Executive Director in this case.

Accordingly, the Executive Director respectfully requests that the Commission deny the instant appeal filed by Mont Belvieu Caverns, LLC and affirm the Executive Director's Tier I negative use determination.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

Mark Vickery, Executive Director

Robert Martinez, Director  
Environmental Law Division

Guy Henry, Senior Attorney  
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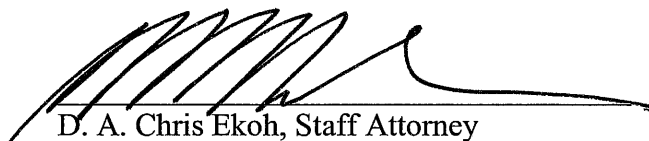
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REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS COMMISSION  
ON ENVIRONMENTAL QUALITY



CERTIFICATE OF SERVICE

I certify that on July 28, 2008, the original and 11 copies of the Executive Director's Response to Mont Belvieu Caverns, LLC's Appeal of the Executive Director's Use Determination Issued to Mont Belvieu North Storage was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality and was served by first-class mail, agency mail, or facsimile to all persons on the attached mailing list.



D. A. Chris Ekoh, Staff Attorney  
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Texas Commission on Environmental Quality

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TCEQ Docket No. 2008-0940-MIS-U(UD-07-11881)

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